

NLWJC- Kagan

Counsel - Box 003 - Folder 007

Timber: NFRC v. Glickman [6]

KRISTINE OLSON
United States Attorney
888 SW Fifth Avenue
Portland, OR 97204-2024
(503) 727-1008

LOIS J. SCHIFFER
Assistant Attorney General
RICHARD M. HALL
ELLEN M. ATHAS
JOHN W. WATTS
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-4720/8236/5208

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

DAN GLICKMAN, Secretary of Agriculture,
and BRUCE BABBITT, Secretary of the
Interior,
Defendants.

Civil No. 95-6244-HO
(Lead Case)

Civil No. 95-6267-HO
(Consolidated Cases)

Defendants'
Opposition to
Plaintiff's Motion
for an Order of
Contempt

INTRODUCTION

On July 27, 1995 the President signed into law the
Rescissions Act, Pub. L. 104-19 (109 Stat. 194) (the "Act").
Section 2001(k) (1) of the Act directed inter alia the Forest
Service and Bureau of Land Management ("BLM") "within 45 days
after the date of the enactment of this Act" to release certain
timber sales "subject to section 318 of Public Law 101-121,"

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER OF CONTEMPT - 1

1 unless the government determined that some of the sales should be
2 withheld under other subsections of 2001(k). The Congress put
3 the federal government on an extremely short timetable for
4 determining whether these sales, most of which had been held up
5 because of environmental and other problems, should continue to
6 be withheld or had to be released.

7 Until the Order of this Court issued on September 13, 1995,
8 the federal government believed that this provision applied only
9 to sales designated in section 318. The Court's September 13th
10 Order held that 2001(k) applied not only to the section 318 sales
11 themselves, but to all sales in national forests and BLM lands in
12 Washington and Oregon, thereby adding approximately 50 additional
13 sales. The Court's Order contained no injunction, nor any
14 specific timetable for compliance. In fact, the federal agencies
15 took steps to prepare for the release of the new sales to comply
16 with the Court's Order, as detailed in the Declarations of Nancy
17 Hayes, Chief of Staff and Counselor for the BLM, and Gray
18 Reynolds, Deputy Chief of the National Forest System, filed on
19 September 20, 1995.

20 Eight days after the Order -- and only six working days
21 later -- plaintiff filed this Motion for an Order of Contempt.
22 The government submits that this Motion for an Order of Contempt
23 is completely out of order and unfounded. Defendants had been
24 analyzing and preparing for release of these newly covered sales
25 before plaintiff filed its Motion for an Order of Contempt and
26 have continued to do so to the present. These actions are

1 detailed in the attached Declarations of Stephen J. Paulson,
2 Group Leader, Forest Products in the Pacific Northwest Region of
3 the Forest Service, and of Lyndon A. Werner, for the BLM, as
4 further discussed. In any event, the Court's Order provides no
5 basis for a finding of contempt.

6 At a minimum, the Court should issue an injunction giving
7 the government the statutory time period of 45 days from the date
8 of the Order to finish the review of these sales to determine:
9 (1) whether any of the sales should continue to be withheld and
10 (2) to act to award and release the remaining sales that can be
11 released.

12 ARGUMENT

13 I.

14 FEDERAL DEFENDANTS HAVE SUBSTANTIALLY 15 COMPLIED WITH THE COURT'S ORDER

16 A. NFRC Has Failed To Satisfy The High Burden 17 Of Proof To Establish Contempt

18 To establish civil contempt, NFRC must satisfy a very high
19 standard of proof. NFRC must demonstrate that the BLM and Forest
20 Service disobeyed "a specific and definite court order" by
21 failing to take all reasonable steps within the party's power to
22 comply. See In re Dual-Deck Video Cassette Antitrust Lit., 10
23 F.3d 693, 695 (9th Cir. 1993); Balla v. Idaho State Board of
24 Corrections, 869 F.2d 461, 466 (9th Cir. 1989). NFRC must prove
25 this disobedience with "clear and convincing" evidence. See
26 Dual-Deck, 10 F.3d at 695; Balla, 869 F.2d at 466.

1 Measured against this high burden, plaintiff's Motion for an
2 Order of Contempt is unsupported and must be rejected. In fact,
3 plaintiff presents no declaration or any other evidence
4 supporting any claim of contemptuous conduct. The single
5 supporting declaration of Christopher I. West addresses Tom
6 Tuchmann's role, presumably seeking to justify Mr. Tuchmann being
7 made a target of the request for incarceration, and attaches a
8 newspaper article. Thus, apparently based solely on a newspaper
9 account of Mr. Tuchmann's spokesman's statement, plaintiff boldly
10 asserts that contempt is warranted. It is not.

11 Indeed, as was set forth in the federal defendants' filing
12 of September 20, 1995 -- filed one day prior to plaintiff's
13 Motion for an Order of Contempt -- work was proceeding to prepare
14 to follow the Court's Order. The Forest Service was specifically
15 taking steps "to ensure compliance with the Court's Order,
16 including participating in numerous meetings, conducting further
17 review and collecting information on sales within the geographic
18 region as interpreted by the Court to determine what would be
19 required to award and release such sales." Declaration of Gray
20 F. Reynolds dated September 20, 1995, at paragraph 6, previously
21 filed but attached here for the Court's convenience as a part of
22 Exhibit A. Similarly, Nancy Hayes, Chief of Staff and Counsellor
23 for the BLM, "asked the BLM Oregon State Director to further
24 review the timber sale contracts within the geographic region as
25 interpreted by the Court, and to gather information necessary to
26 proceeding with these sales; in particular, information that

1 would assist the BLM in determining whether there is a reason not
2 to proceed with the award of a given timber sale contract and to
3 offer the purchaser replacement timber." Declaration of Nancy K.
4 Hayes, dated September 20, 1995, at paragraph 3, attached here as
5 part of Exhibit A.

6 Now, two weeks later, the agencies continue their work. As
7 set forth in the Declaration of Stephen J. Paulson, the "Forest
8 Service Regional Office has been in contact with the National
9 Forests that fall under the Court's Order to collect additional
10 information on the status of sales eligible for release." See
11 Declaration of Stephen J. Paulson, attached hereto as Exhibit B,
12 at paragraph 4. This information includes "determining the level
13 of deterioration of [timber in] sales eligible for release which
14 contain salvage timber, determining whether purchasers or high
15 bidders are still in business, and confirming the absence of bird
16 species known to be nesting." Id. Further, since the September
17 20, 1995 Declaration, the Forest Service has "initiated the
18 process of determining what additional work needs to be done on
19 sales . . . before they can be operated." Id. Similarly, the
20 Bureau of Land Management continued work on its reviews described
21 in the Declaration of Nancy Hayes of September 20, 1995. See
22 Declaration of Lyndon A. Werner, dated October 5, 1995, attached
23 hereto as Exhibit C.

24 Thus, plaintiff has failed to show any contempt. The entire
25 premise of NFRC's motion for contempt, that the quote from the
26 press spokesman of the U.S. Interagency Office of Forestry and
27

1 Economic Development is evidence that the Federal government is
2 refusing to take steps to comply with the Court's Order, is
3 fallacious. Compliance is measured by the actions of the federal
4 agencies and not by a single comment of a non-legal spokesperson
5 interpreting government attorneys' analysis and immediate
6 reactions to the Court's Order. Based on the above-cited
7 declarations, defendants are complying; there has simply been no
8 "failure" to follow the Court's Order. Balla, 869 F.2d at 466.
9 Plaintiff's citation to a newspaper quote is hardly the "clear
10 and convincing" evidence required. Id.

11 B. Defendants' Conduct Surpasses The "Reasonable Steps" And
12 "Substantial Compliance" Standards

13 Failure to comply, which might provide a basis for a finding
14 of contempt, is not taking "all the reasonable steps within
15 [one's] power to insure compliance with the order[]." Balla, 869
16 F.2d at 466 (quoting Sekaquaptewa v. MacDonald, 544 F.2d 396, 406
17 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977)).
18 "Substantial compliance with a court order is a defense to an
19 action for civil contempt." Balla, 869 F.2d at 466 (citing
20 General Signal Corp. v. Donallco, 787 F.2d 1376, 1379 (9th Cir.
21 1986)).

22 The BLM and Forest Service have been taking -- and will
23 continue to take -- "all reasonable steps." For example, the
24 agencies have been collating and analyzing information on the
25 affected sales. Given the relevant time span from 1991 through
26 July 27, 1995 and the number of forests involved, this is not a
27 simple task. In addition to identifying the purchaser or high

1 bidder of each sale, the agencies also have reviewed relevant
2 background information on the purchaser or high bidder, such as
3 whether the company was still in business or previously had
4 stated a lack of interest in proceeding with the relevant sale.
5 See Paulson Decl. at paragraph 4. The agencies also collected
6 and reviewed information to clarify which sales could be affected
7 by either past or ongoing litigation. See e.g., Judgment on
8 Decision by the court and Order on Motions in Leavenworth v.
9 Ferraro, Case No. C94-1025C (W.D. Wash. March 3, 1995), attached
10 hereto as Exhibit E. In addition, the agencies have continued
11 with the collection and analysis of documents relating to the
12 basis for the delay in each sale. Assessments, presently in
13 varying degrees of completeness, are being made whether new
14 facts, such as fires, termination of the business of the high
15 bidder, or other causes, make release on the original terms and
16 conditions impracticable or impossible. See Paulson Decl. at
17 paragraph 4. If release on original terms and conditions will be
18 impracticable or impossible, efforts are being made to identify
19 substitute timber. See Hayes Decl. at paragraph 3. The
20 identification and review process involved not only the land
21 management agencies, Forest Service and the BLM, but also the
22 consultation agency, the National Marine Fisheries Service in the
23 Department of Commerce. See Werner Decl. at paragraph 5.

24 These actions certainly constitute "substantial compliance,"
25 especially when judged by the shortness of time between the
26 September 13th Order, which imposed a new and substantial burden

1 on the federal government, and the September 21st Motion for an
2 Order of Contempt. There has been no contempt.

3 II.

4 CONTEMPT IS NOT AVAILABLE, IN ANY EVENT,
5 BECAUSE THE ORDER IS NOT SPECIFIC AND
6 DEFINITE AS TO FEDERAL DEFENDANTS' DUTIES

7 A finding of contempt for violation of a prior court order
8 is justified only when the specific duties compelled by an order
9 are "clear and unambiguous." United States v. International
10 Brotherhood of Teamsters, 899 F.2d 143, 146 (2d Cir. 1990)
11 (quoting New York State National Organization For Women v. Terry,
12 886 F.2d 1339, 1351 (2d Cir. 1989)); International Longshoremen's
13 Assoc. v. Philadelphia Marine Trade Assoc., 389 U.S. 64 (1967);
14 Balla, 869 F.2d at 464, 465.

15 The September 13th Order of the Court was not that type of
16 order. The Order was a decision resolving the legal issue
17 presented on cross-motions for partial summary judgment in an
18 action which sought both a declaratory judgment and an
19 injunction, concluding:

20 Plaintiff's motion for summary judgment as to its first
21 and second claims for relief (#31) is allowed.
22 Defendant's cross motion for summary judgment (#24) is
23 denied. Order at 11.

24 Federal defendants interpreted and continue to interpret the
25 Order as deciding the point of law presented but being neither
26 the final resolution of the case nor the entry of a declaratory
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1 judgment¹ or injunction. See Federal Defendants' Memorandum in
2 Support of Motion for Reconsideration of Consolidation Order and
3 Motion for Transfer at 3; See also Fed. R. Civ. P. 65(d)
4 ("[e]very order granting an injunction . . . shall be specific in
5 terms [and] shall describe in reasonable detail, and not by
6 reference to the complaint or other document, the act or acts
7 sought to be restrained").² As explained above, defendants have
8 been taking actions consistent with that understanding of the
9 Order.

10 Plaintiff argues that the Order was an injunction, as indeed
11 it knows it must be in order to have the necessary premise for a
12 motion for contempt, but the very argument highlights the key
13 elements that are missing from the Order to be "clear and
14 unambiguous." The Order does not contain any time limit for the
15 compliance that plaintiff seeks. So plaintiff argues that
16 because the Order was issued three days after September 10, 1995
17 (the forty-fifth day after enactment of Pub. L. 104-19), the

18
19 ¹The September 13th Order does not appear to meet the
20 requirements for a declaratory judgment. "Pursuant to Rule 58,
21 in declaratory judgment actions, district courts must declare
22 specifically and separately the rights of the parties." Alpine
23 State Bank v. Ohio Cas. Ins. Co., 941 F.2d 554, 558 (7th Cir
24 1991). Even if the September 13th Order were a declaratory
25 judgment, it would not provide a basis for an order of contempt.
A declaratory judgment is a "much milder form of relief than an
injunction. Though it may be persuasive, it its not ultimately
coercive; non-compliance with it may be inappropriate, but is not
contempt." Armstrong v. Executive Office of President, 1 F.3d
1274, 1289 (D.C.Cir. 1993) (quoting Steffel v. Thompson, 415 U.S.
452, 471 (1974)).

26 ²See also Wright, Miller & Kane, Federal Practice and
27 Procedure: Civil 2d §2955 at 314-322.

28 DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER OF CONTEMPT - 9

1 Order implies that "immediate" compliance was ordered.³
2 Similarly, when attempting to emphasize defendants' alleged
3 understanding that immediate compliance with the Order was
4 required, plaintiff argues that "[a]t no time did the government
5 claim not to understand that the law required the immediate
6 release of the sales that were subject to the law; . . ."
7 Plaintiff Memorandum at 6 (emphasis added). Plaintiffs' reliance
8 on the deadline in the law, rather than any deadline in the
9 Order, only emphasizes the fact that the Order is not an
10 injunction and therefore, understandably, is missing perhaps the
11 key element of specificity when the Executive Branch is ordered
12 to do something -- the date by which it must do it.

13 The failure to include a specific date for compliance is a
14 bar to contempt even when the alleged contempt is of a final
15 judgment. United Steelworkers of America, AFL-CIO-CLC v.
16 Pendergrass, 819 F.2d 1263, 1270 (3rd Cir. 1987) (Court found
17 that contempt was not appropriate in absence of judgment
18 specifying time limit for compliance). It therefore follows that
19 failure to include a specific date for compliance, as well as any
20 other necessary term⁴, in an order that is not a final judgment

21 ³Plaintiff NFRC's Memorandum in Support of Motion for Order
22 of Contempt to Enforce September 13, 1995 Order or in Alternative
23 to Clarify Order at 6 ("Plaintiff Memorandum").

24 ⁴See Citizens for a Better Environment v. Metropolitan
25 Transportation Commission, 775 F. Supp. 1291, 1299-1300 (N.D.
26 Cal. 1991). The court found no contempt even assuming that the
27 agency defendant, which had missed a statutory deadline, had
28 subsequently failed to comply with the court's prior order
requiring reasonable forward progress toward compliance. Id. at
(continued...)

1 would also bar contempt. To support a finding of contempt, the
2 mandated duty, including time for compliance, must be explicit.
3 It cannot be implied. Id. These "specificity requirements are
4 not 'mere[ly] technical' but are 'designed to prevent uncertainty
5 and confusion ... and to avoid' basing a contempt citation on a
6 decree too vague to be understood." NBA Properties, Inc. v.
7 Gold, 895 F.2d 30, 32 (1st Cir. 1990) (internal citations
8 omitted).

9 The factual and procedural details of the cases relied on by
10 plaintiff, by their contrast to the factual and procedural
11 context of the pending motion for contempt, emphasize that a
12 contempt order may not be premised on the September 13th Order.
13 In Young v. U.S. ex rel Vuitton et Fils S.A., 481 U.S. 787
14 (1987), the Court sustained a criminal contempt conviction for
15 violation of a final consent decree prohibiting violations of
16 trademark. In Stone v. City and County of San Francisco, 968
17 F.2d 850 (9th Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993)
18 the court addressed violations of a final consent decree
19 prohibiting overcrowding in prisons. In General Signal Corp. v.
20 Donallco, Inc., 787 F.2d 1376 (9th Cir. 1986) the court was also
21 enforcing a final consent decree. The final judgments being
22 enforced in these cases contrast sharply with the September 13th
23

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25 '(...continued)
26 1297, 1300. The court held that its prior order did not clearly
27 define the duties required of the agency to make reasonable
28 forward progress. Id. at 1300 n.11.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER OF CONTEMPT - 11

1 Order which was neither a final injunction nor a declaratory
2 judgment.

3 III.

4 EVEN IF AVAILABLE, CONTEMPT IS
5 INAPPROPRIATE AT THIS TIME

6 When faced with a claim, as here, of contempt by a Cabinet
7 officer, appointed by the President and of a co-equal branch of
8 the government, the courts should treat the explanations of that
9 officer in "the most careful and reasoned" manner. A court
10 should only hold such an officer in contempt as "a last resort,
11 to be undertaken only after all other means to achieve the ends
12 legitimately sought by the court have been exhausted." See In Re
13 Attorney General, 596 F.2d 58, 65 (2d Cir. 1979). Moreover, in
14 accord with the general rules of equity, a court, in selecting
15 contempt sanctions, "is obliged to use the 'least possible power
16 adequate to the end proposed.'" Spallone v. United States, 493
17 U.S. 265, 274 (1990). See also United States Steelworkers of
18 America, 819 F.2d at 1269-70 (because prior judgment did not
19 include a specific time limit, court denied contempt and instead
20 issued an order directing the government to take specific action
21 within 60 days).⁵

22 ⁵ It is also well settled that, "in the civil contempt
23 setting, the court has no independent interest in vindicating its
24 authority should its order be violated." In Re Magwood, 785
25 F.2d 1077, 1081 n.9 (D.C. Cir. 1986) quoting WMATA v. Amalgamated
26 Transit Union, 531 F.2d 617, 622 (D.C. Cir. 1976). Consequently,
civil contempt sanctions are employed solely for remedial
purposes and "must not be punitive." In Re Magwood, 785 F.2d at
1081. Further, the court must consider the contemnor's "good
faith" efforts "in mitigation of any penalty." Tinsley v.

(continued...)

1 There is simply no basis -- certainly there was none stated
2 by plaintiff to support its motion -- to hold in contempt either
3 the defendants or the two individual targets chosen by plaintiff.
4 The Court should establish a schedule and change its ruling on
5 the legal issue presented into an injunction if it wishes to do
6 so. That is the "least possible power adequate to the end
7 proposed" at this time. United Steelworkers of America, 819 F2d
8 at 1269-70.

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⁵(...continued)

24 Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) citing WMATA v.
25 Amalgamated Transit Union, 531 F.2d at 621-22. Thus, even
26 assuming that defendant somehow violated this Court's prior
order, defendants' substantial efforts to resolve expeditiously
this matter must be taken into account in devising additional
remedial measures (if any).

27 DEFENDANTS' OPPOSITION TO PLAINTIFF'S
28 MOTION FOR AN ORDER OF CONTEMPT - 13

IV.

TOM TUCHMANN IS NOT A PROPER OR USEFUL
TARGET FOR ENFORCEMENT OF THE ORDER

Plaintiff simply has the wrong person targeted for contempt by naming Mr. Tuchmann. As described in the Declaration of Tom Tuchmann attached as Exhibit D and the attached job description, he is a high-level and visible figure in the Northwest's rancorous forest dispute. But he is a high-level staff person with no line authority over the Forest Service or the Bureau of Land Management, which by law administer Federal forests and by law have the duty to comply with Pub. L. 104-19. See Tuchmann Decl. at paragraph 3. While he is a government employee and is certainly bound by any injunction that the Court enters, he does not have the authority to implement any order and has not, in fact, been more than peripherally involved in the issues of the September 13th Order. Id.

V.

ANY INJUNCTION THAT THE COURT ENTERS
SHOULD ESTABLISH A SCHEDULE FOR COMPLIANCE

Although defendants believe that the Order is not sufficiently specific and unambiguous to provide a basis for contempt, under long-standing government policy, federal defendants have been preparing for release of the covered sales while at the same time considering whether or not to appeal. Defendants cannot appeal from the Order as it stands; it does not decide the entire case and does not meet the test of Fed. R. Civ. P. 65 for an injunction. Although a decision whether to appeal

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR AN ORDER OF CONTEMPT - 14

1 has yet to be made, defendants have no objection to the entry of
2 an injunction at this time.

3 If the Court were to enter an injunction, defendants
4 strongly differ with the time schedule set forth in plaintiff's
5 proposed form of injunction. Plaintiff's proposal seeks entry of
6 an injunction that provides for immediate release. Plaintiff's
7 proposed form of injunction is set out in Plaintiff NFRC's Motion
8 for Order of Contempt to Enforce September 13, 1995 Order or in
9 the Alternative to Clarify Order, dated September 21, 1995. Its
10 form is acceptable to defendants except for the schedule for
11 compliance, which in the proposed injunction at paragraph 2 sets
12 forth "immediately".

13 Defendants respectfully request that they be given 45 days
14 from the date of the September 13th Order to act to award and
15 release those sales which can be released. This 45-day period
16 mirrors the time allowed by Section 2001(k)(1). This would be a
17 reasonable amount of time given the approximately 50 sales that
18 have been added by the Court's Order.⁶

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25 ⁶The forty-five day period in the statute was
26 unrealistically short given the complexity of the task. However,
consistent with Congress' urgency, defendants will ask no more
time here.

CONCLUSION

For the above reasons, the Motion for Order of Contempt or in the Alternative to Clarify Order should be denied.

Dated this 6th day of October, 1995.

Respectfully Submitted,

Richard M. Hall

RICHARD M. HALL

ELLEN M. ATHAS

JOHN W. WATTS

U.S. Department of Justice
Environment & Natural

Resources Division

General Litigation Section

P.O. Box 663

Washington, DC 20040-0663

(202) 272-4720/8236/6208

Attorneys for the Defendant

OF COUNSEL:

KAREN MOURITSEN

Office of the Solicitor

U.S. Department of the Interior

Washington, D.C. 20240

JAY MCWHIRTER

Office of the General Counsel

U.S. Department of Agriculture

Washington, D.C. 20250

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that on October 6, 1995, he
3 caused one copy of the foregoing DEFENDANTS' OPPOSITION TO
4 PLAINTIFF'S MOTION FOR ORDER OF CONTEMPT to be served via
facsimile and by Federal Express upon the counsel of record
hereinafter named:

5 MARK RUTZICK
500 Pioneer Tower
6 888 S.W. Fifth Avenue
Portland, OR 97204-2089
7 Telephone: (503) 499-4572
Fax : (503) 295-0915

8 and by Federal Express overnight mail upon the counsel of record
9 hereinafter named:

10 PATTI A. GOLDMAN
ADAM J. BERGER
11 KRISTEN L. BOYLES
Sierra Club Legal Defense Fund
12 705 Second Avenue, Suite 203
Seattle, WA 98104
13 Telephone: (206) 343-7340
Fax : (206) 343-1526

14 MARIANNE DUGAN
15 DEBORAH N. MAILANDER
Western Environmental Law Center
16 1216 Lincoln Street
Eugene, OR 97401
17 Telephone: (503) 485-2471
Fax : (503) 485-2457

18 SCOTT HORNGREN
19 Haglund & Kirtley
One Main Place
20 101 S.W. Main, Suite 700
Portland, Oregon 97204
21 Fax: (503) 225-1257

22 Richard M. Hall
23 Richard Hall
24
25
26
27

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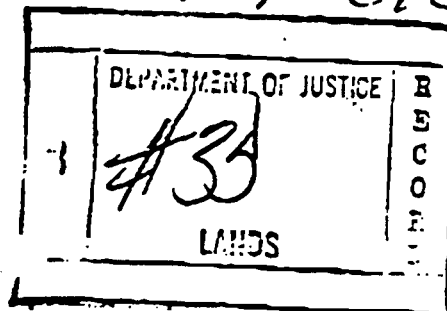
KRISTINE OLSON, OSB# 73254
 United States Attorney
 888 SW Fifth Avenue
 Suite 1000
 Portland, OR 97204-2024
 (503) 727-1008

95 SEP 20 PM 4:47 25 AM 11:23

CLERK, U.S. DISTRICT COURT
 DISTRICT OF OREGON
 EUGENE, OREGON

LOIS J. SCHIFFER
 Assistant Attorney General
 WELLS D. BURGESS
 MICHELLE L. GILBERT
 ANDREA L. BERLOWE
 EDWARD A. BOLING
 U.S. Department of Justice
 Environment and Natural Resources Division
 General Litigation Section
 P.O. Box 663
 Washington, D.C. 20044-0663
 Telephone: (202) 272-6217

BY



IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)
)
 Plaintiff,)
)
 v.)
)
 DAN GLICKMAN, in his capacity)
 as Secretary of Agriculture,)
 BRUCE BABBITT, in his capacity)
 as Secretary of Interior)
)
 Defendants.)

Civil No. 95-6244-HO

Defendants' Notice
 of Filing

Defendants hereby file the attached declarations of Mr. Gray F. Reynolds and Ms. Nancy Hayes explaining actions taken by the agencies in compliance with this Court's September 13, 1995 Order granting plaintiff's motion for summary judgment as to its first and second claims for relief. Because questions have been raised regarding what steps the defendants have been taking in the one week following issuance of the Court's Order, the

Page 1 - DEFENDANT'S NOTICE OF FILING

EXHIBIT A

1 agencies are filing these declarations at this time to inform the
2 Court of defendants' actions in the past week. The agencies
3 intend to file a more detailed report explaining additional steps
4 being taken shortly.

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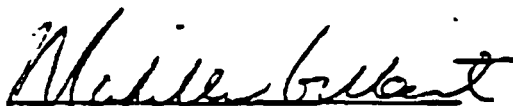
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1 Dated this 20th day of September, 1995.

2 Respectfully submitted,

3 KRISTINE OLSON
4 United States Attorney

5 LOIS J. SCHIFFER
6 Assistant Attorney General

7 

8 WELLS D. BURGESS
9 MICHELLE L. GILBERT
10 ANDREA L. BERLOWE
11 EDWARD BOLING
12 United States Department of Justice
13 Environment and Natural
14 Resources Division
15 General Litigation Section
16 P.O. Box 663
17 Washington, DC 20044-0663
18 (202) 272-6217

19 Attorneys for Defendants

20 Of Counsel:

21 MICHAEL GIPPERT
22 Office of the General Counsel
23 United States Department of Agriculture
24 Washington, DC

25 KAREN MOURITSEN
26 Office of the Solicitor
United States Department of the Interior
Washington, DC

NOTICE OF FILING

KRISTINE OLSON
 United States Attorney
 888 SW Fifth Avenue
 Suite 1000
 Portland, OR 97204-2024
 503-727-1008
 OSB # 73254

LOIS J. SCHIFFER
 Assistant Attorney General
 WELLS D. BURGESS
 MICHELLE L. GILBERT
 ANDREA L. BERLOWE
 EDWARD BOLING
 U.S. Department of Justice
 Environment and Natural Resources Division
 P.O. Box 663
 Washington, D.C. 202-272-6217

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

DAN GLICKMAN, in his capacity as
 Secretary of Agriculture,
 BRUCE BABBITT, in his capacity as
 Secretary of the Interior

Defendants.

Civil No. 95-6244-HO

DECLARATION OF
 GRAY F. REYNOLDS

I, Gray F. Reynolds, do hereby depose and say that:

1. My name is Gray F. Reynolds. My position is Deputy Chief of the National Forest System in the Washington office of the Forest Service.

2. My responsibilities include oversight and management of the various components of the National Forest System. As such, I am familiar with ongoing litigation which affects operations of the National Forest System.

3. In particular I am familiar with the case, NFERC v. Glickman, Civil No. 95-6244-HO, and the Court's Order on September 13, 1995.

4. Following issuance of the Court's Order on September 13, 1995 granting Northwest Forest Resources Council's motion for summary judgment as to claims for relief one and two, the agency has been reviewing the Order to determine how to proceed in compliance with the Court's Order.

5. It is the Forest Service's understanding that the Order is not an injunction pursuant to the requirements of Rule 65(d) of the Federal Rules of Civil Procedure. The Forest Service does understand that in the September 13 Order, the Court declared that Section 2001(k)(1) of Pub. L. 104-19, the Rescissions Act of 1995, applies to "all national forests in Oregon and Washington and all Bureau of Land Management districts in Western Oregon."

6. In accordance with that holding, the Forest Service has been taking steps to ensure compliance with the Court's Order, including participating in numerous meetings, conducting further review and collecting information on sales within the geographic region as interpreted by the Court to determine what would be required to award and release such sales, and reviewing to what extent any statutory exceptions would apply to these sales.

7. When the Forest Service completes its review, it will issue explicit direction for proceeding with further action on the affected sales, and will file a new report with the Court explaining the additional steps the agency has taken in compliance with the Court's Order at that time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, District of Columbia on September 20 1995

A handwritten signature in cursive script, appearing to read "Gray F. Reynolds", written over a horizontal line.

Gray F. Reynolds

KRISTINE OLSON
 United States Attorney
 888 SW Fifth Avenue
 Suite 1000
 Portland, OR 97204-2024
 503-727-1008
 OSB #73254

LOIS J. SCHIFFER
 Assistant Attorney General
 WELLS D. BURGESS
 MICHELLE L. GILBERT
 ANDREA L. BERLOWE
 EDWARD BOLING
 U.S. Department of Justice
 Environment and Natural Resources Division
 General Litigation Section
 P.O. Box 663
 Washington, D.C. 20044-0663
 Telephone: 202-272-6217

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

DAN GLICKMAN, in his capacity as
 Secretary of Agriculture,
 BRUCE BABBITT, in his capacity as
 Secretary of Interior

Defendants.

Civil No. 95-6244-HO

DECLARATION OF
 NANCY K. HAYES

I, Nancy K. Hayes, do hereby depose and say that:

1. My name is Nancy K. Hayes. I am Chief of Staff and Counselor for the Bureau of Land Management. My responsibilities include providing policy guidance to the State Directors who implement the various BLM programs. The BLM Oregon State Director implements BLM's timber sale program in Oregon.

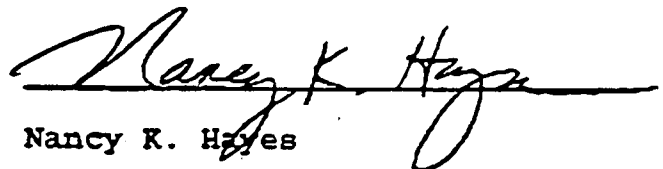
DECLARATION OF NANCY K. HAYES, Page 1

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sale contracts," Section 2001(k). Since Judge Hogan's ruling on September 13, 1995, granting plaintiff Northwest Forest Resource Council's Motion for Summary Judgment as to Claims for Relief One and Two, I and BLM staff have been reviewing the Court's decision in the context of Section 2001(k).

3. In accordance with the Court's ruling, I have asked the BLM Oregon State Director to further review the timber sale contracts within the geographic region as interpreted by the Court, and to gather information necessary to proceeding with these sales; in particular, information that would assist the BLM in determining whether there is a reason not to proceed with the award of a given timber sale contract and to offer the purchaser replacement timber. I have been assured that this work is proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. on September 20, 1995.


Nancy K. Hayes

KRISTINE OLSON
 United States Attorney
 888 SW Fifth Avenue
 Suite 1000
 Portland, OR 97204-2024
 503-727-1008
 OSB # 73254

LOIS J. SCHIFFER
 Assistant Attorney General
 WELLS D. BURGESS
 MICHELLE L. GILBERT
 ANDREA L. BERLOWE
 EDWARD BOLING
 U.S. Department of Justice
 Environment and Natural Resources Division
 P.O. Box 663
 Washington, D.C. 202-272-6217

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,)	
	)	Civil No. 95-6244-HO
v.)	
	)	DECLARATION OF
DAN GLICKMAN, in his capacity as	)	Stephen J. Paulson
Secretary of Agriculture,)	
BRUCE BABBITT, in his capacity as)	
Secretary of the Interior)	
)	
Defendants.)	
)	

I, Stephen J. Paulson, do hereby depose and say that:

1. My name is Stephen J. Paulson. My position is the Group Leader, Forest Products in the Pacific Northwest Region. I have been in this position for 7 years. I have over 28 years of experience with the Forest Service.

2. My responsibilities include oversight and management of all aspects of timber sale planning and administration in the Region. As such, I am familiar with ongoing litigation which affects Forest Service timber sales in the Region. In particular

EXHIBIT R

I am familiar with the case, NFERC v. Glickman, Civil No. 95-6244-HO, and the Court's Order on September 13, 1995 (Court's Order). I previously made a declaration in this case which was executed on August 14, 1995.

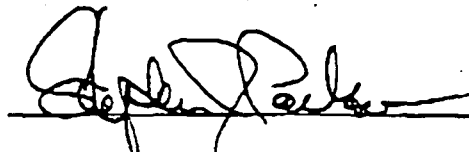
3. Since the Court's Order, I have compiled resource information responsive to plaintiffs' discovery requests, and to release additional sales as described in our September 29, 1995, Cross Motion for Summary Judgment.

4. Since September 20, 1995, the Forest Service Regional Office has been in contact with the National Forests that fall under the Court's Order to collect additional information on the status of sales eligible for release. This information includes: determining the level of deterioration of sales eligible for release which contain salvage timber, determining whether purchasers or high bidders are still in business, and confirming the absence of bird species known to be nesting. Furthermore, the Forest's have initiated the process of determining what additional work needs to be done on sales (remarking of trees or units, road accessibility, etc.) before they can be operated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Portland, Oregon, on

October 4, 1995



Stephen J. Paulson

KRISTINE OLSON
 United States Attorney
 888 S.W. Fifth Avenue
 Suite 1000
 Portland, OR 97204-2024
 Telephone: 503-727-1008
 OSB #73254

LOIS J. SCHIFFER
 Assistant Attorney General
 WELLS D. BURGESS
 MICHELLE L. GILBERT
 ANDREA L. BERLOWE
 EDWARD BOLING
 U.S. Department of Justice
 Environment and Natural Resources Division
 General Litigation Section
 P.O. Box 663
 Washington, D.C. 20044-0663
 Telephone: 202-272-6217

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

v.

DAN GLICKMAN, in his capacity as
 Secretary of Agriculture,
 BRUCE BABBITT, in his capacity as
 Secretary of Interior

Defendants.

Civil No. 95-6244-HO

THIRD DECLARATION OF
 LYNDON A. WERNER

I, Lyndon A. Werner, do hereby depose and say that:

1. My name is Lyndon A. Werner. I have previously prepared a declaration for this case, in which I described my position with the Bureau of Land Management (BLM) and the nature of my responsibilities.

THIRD DECLARATION OF LYNDON A. WERNER, Page 1

EXHIBIT C

2. I am familiar with the Rescissions Act, Public Law 104-19 (109 Stat. 194), including the provisions regarding "Award and Release of Previously Offered and Unawarded Timber Sales contracts," Section 2001(k). In my work with the BLM timber sale program in the State Office, I am familiar with the Section 318 timber sales which were awarded pursuant to the Act, and other timber sales covered by Judge Hogan's September 13, 1995, order (timber sales offered in 1991 through July 27, 1995).

3. The declaration of Nancy K. Hayes dated September 20, 1995, describes work in progress on that date. The work has continued as described in the September 20 declaration, and is largely completed. Paragraphs 4 and 5 describe the process BLM followed starting before and continuing after September 20.

4. On the 14 awarded Section 318 timber sales and 27 unawarded timber sales covered by Judge Hogan's September 13, 1995, order, BLM made marbled murrelet "known to be nesting" determinations on portions of two Section 318 sales and on four FY 1991 sales (one entire sale; three partial sales). Informal coordination between BLM and U.S. Fish and Wildlife Service (FWS) biologists occurred on these sales between September 7-13, 1995. This coordination culminated in a letter to the Oregon State Director from the FWS Oregon State Office, dated September 22, 1995, in which the FWS concurred with the "known to be nesting" determinations made by BLM.

5. BLM experts, with the assistance of experts from the National Marine Fisheries Service, have continued to analyze the

Section 318 and timber sales covered by Judge Hogan's September 13, 1995, order to identify other potential adverse impacts. Information has been gathered which may be useful in planning future timber sales. An additional use for this information would be to prepare for possible discussions with purchasers of the Section 318 and FY 1991 timber sales to consider the possibility of modifying contracts to mitigate any identified undesirable impacts of harvesting the sales as originally designed and offered.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on October 5, 1995.

Lyndon A. Werner

Lyndon A. Werner

KRISTINE OLSON
 United States Attorney
 888 SW Fifth Avenue
 Portland, OR 97204-2024
 (503) 727-1008

LOIS J. SCHIFFER
 Assistant Attorney General
 RICHARD M. HALL
 MICHELLE L. GILBERT
 EDWARD A. BOLING
 JEAN WILLIAMS
 ELLEN J. KOHLER
 U.S. Department of Justice
 Environment and Natural Resources Division
 P.O. Box 663
 Washington, D.C. 20044-0663
 Telephone: (202) 272-8338

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,	)	Civil No. 95-6244-HO
	)	(Lead Case)
v.)	
	)	Civil No. 95-6267-HO
	)	(Consolidated Cases)
GLICKMAN and RABBITT,)	
	)	Declaration of
Defendants.	)	E. Thomas Tuchmann
)	
)	
)	

I, E. Thomas Tuchmann, declare under penalty of perjury that the following is true and correct.

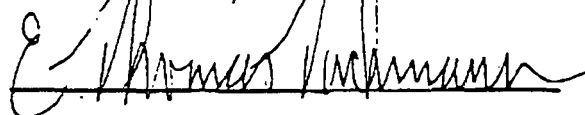
1. I am the Director of the U.S. Office of Forestry and Economic Development, located in Portland, Oregon. I have served in this position since December 1993.

EXHIBIT D

2. Attached is the White House memorandum creating my position and assigning me duties and authority. As this memorandum indicates, my relationship to federal agencies is one of coordination and assistance. I also serve as the administration contact for state, tribal and local officials and the public on forestry and economic development issues in the region

3. I do not have line authority to order the United States Forest Service or the Bureau of Land Management to award specific timber sale contracts or otherwise comply with the Court's September 13, 1995 Order. Moreover, I have only been briefly and peripherally involved on a consultative basis with the issues raised by the Order and have not been involved with the work of complying with it.

Executed at Portland, Oregon on

October 4, 1995


E. Thomas Tuchmann

THE WHITE HOUSE
WASHINGTON

November 29, 1993

MEMORANDUM FOR

SECRETARY BABBITT, DEPARTMENT OF THE INTERIOR
SECRETARY BROWN, DEPARTMENT OF COMMERCE
SECRETARY CISNEROS, DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SECRETARY ESPY, DEPARTMENT OF AGRICULTURE
SECRETARY REICH, DEPARTMENT OF LABOR
ADMINISTRATOR BROWNER, ENVIRONMENTAL PROTECTION
AGENCY
ADMINISTRATOR BOWLES, SMALL BUSINESS
ADMINISTRATION
LEON PANETTA, OFFICE OF MANAGEMENT AND BUDGET
BOB RUBIN, NATIONAL ECONOMIC COUNCIL
KATIE MCGINTY, OFFICE ON ENVIRONMENTAL POLICY
JOAN BAGGETT, OFFICE OF POLITICAL AFFAIRS
MARK GEARAN, COMMUNICATIONS OFFICE
CAROL RASCO, OFFICE FOR DOMESTIC POLICY

FROM:

ROY NEEL, DEPUTY CHIEF OF STAFF 

SUBJECT:

INTERAGENCY OFFICE OF FORESTRY AND ECONOMIC
DEVELOPMENT

BACKGROUND:

"We must never forget the human and economic dimensions of these problems. Where sound management policies can preserve the health of forest lands, sales should go forward. Where this requirement cannot be met, we need to do our best to offer new economic opportunities for year round, high wage, high-skill jobs. We may make mistakes but we will try to end the gridlock within the federal government and we will insist on collaboration, not confrontation."

- President William J. Clinton
White House Forest Conference
Portland, Oregon
April 3, 1993

The purpose of this memorandum is to convey to you the support and interest of the White House for the creation of the Interagency Office on Forestry and Economic Development in the Pacific Northwest. We are excited this effort is being undertaken and are enthusiastic about the designation of Tom Tuchmann as the Director of the Office.

In pledging to resolve the northern California and Pacific Northwest's forest crisis, the President promised to untangle a complex web of administrative inaction, court orders, and interagency differences. On July 2nd the President announced his Forest Plan for a Sustainable Economy and Sustainable Environment (see attached). The plan has been nationally recognized for the manner in which it attempts to reconcile the jobs vs. environment issue. We now need a "full-court press" strategy to ensure the effective implementation of the plan.

The Administration has already made some significant progress on this front. The attached memoranda of understanding, which most of you recently signed, were drafted to help guide the implementation effort. A forest management Interim Interagency Implementation Team has been formed in Portland, Oregon. The states and National Economic Council have established working relationships to provide more effective delivery of worker and community assistance programs. All agencies have been working to secure funding for program implementation within existing overall budget constraints for FY 1994 and FY 1995.

Yet, the plan is complex and there is little margin for error. To ensure successful plan implementation, the Administration is establishing an Interagency Office of Forestry and Economic Development.

PURPOSE AND RESPONSIBILITIES:

The primary responsibilities of this office include:

- fostering close coordination among agencies and work groups at the regional level;
- ensuring proper and continual coordination between regional activities and Washington-based policy and budget initiatives;
- assisting agencies in plan implementation;
- serving as a visible point of contact for state/community groups;
- enhancing the close coordination of public communications on the President's plan within the region;
- providing a visible expression of the President's continuing commitment to full and aggressive implementation of his program.

The Interagency Office of Forestry and Economic Development will be located in Portland, Oregon for two years. Portland is centrally located within the region, which will make travel to northern California and the Pacific Northwest easier.

The Director will serve as the primary Administration representative on all issues relating to

the implementation of the plan, both within the region and also between the region and Washington-based Implementation activities. The Director shall serve as a liaison to all agencies and provide reports to the White House about progress on all fronts - from forest practices, to economic assistance, to the progress on moving timber to mills. All agency personnel in Washington, and in the region, will give the director full cooperation so that the President's plan is fully implemented. We expect this effort involving several agencies to be a shining example of the Clinton Administration's "Reinvented Government".

In this capacity the Director or his designee will oversee both the Regional Interagency Executive Committee and Community Economic Revitalization Team. The Director will also serve as member and liaison to the Washington, D.C.-based Interagency Executive Committee and Multi-Agency Command. Working with the agencies, the Director will also be responsible for ensuring the effective and timely communication with the Congressional delegation, other community groups and the public generally on all matters relating to plan implementation.

Mr. Tom Tuchmann will serve as Director of the Office. Tom is a forester who understands both the technical and policy components of the region's forestry issues. Tom served as co-chair of the President's transition team effort on the Forest Conference. As Special Assistant to Secretary Babbitt, Tom assisted in designing the Forest Conference and subsequent planning efforts. Attached is a brief biography for your information.

We are all looking forward to successful implementation of the President's forest plan and feel confident that this new interagency office will contribute greatly to our success.

Attachments:

Forest Plan for a Sustainable Economy and Sustainable Environment
Worker and Community Assistance MOU
Forest Management MOU
Tuchmann Biography

N01-9506\5JPMO.CON

Mark C. Rutzick, OSB # 84336
 Alison Kean Campbell, OSB #93011
 MARK C. RUTZICK LAW FIRM
 A Professional Corporation
 500 Pioneer Tower
 888 S.W. Fifth Ave.
 Portland, Oregon 97204-2089
 (503) 499-4573

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
COUNCIL, an Oregon corporation,	)	Lead Case
)	
Plaintiff,	)	Civil No. 95-6267-HO
	)	Consolidated Cases
vs.)	
	)	PLAINTIFF NFRC'S MOTION FOR
DAN GLICKMAN, in his capacity	)	ORDER OF CONTEMPT TO
as Secretary of Agriculture;	)	ENFORCE SEPTEMBER 13, 1995
BRUCE BABBITT, in his capacity	)	ORDER OR IN ALTERNATIVE TO
as Secretary of the Interior,	)	CLARIFY ORDER
)	
Defendants.	)	<u>Oral Argument Requested</u>

Plaintiff Northwest Forest Resource Council ("NFRC") moves the court to enter an order of contempt against the defendants and specific officers and agents of defendants, to enforce the Court's Order of September 13, 1995.

In the alternative, NFRC moves the court to clarify its September 13, 1995 Order to additionally state the following:

"IT IS HEREBY ORDERED THAT:

1. NFRC's motion for a declaratory judgment is granted. Section 2001(k) (1) of Pub. L. 104-19 requires defendants Glickman

Page 1 - NFRC'S MOTION FOR CONTEMPT
 OR IN THE ALTERNATIVE TO
 ENFORCE SEPTEMBER 13 ORDER

MARK C. RUTZICK LAW FIRM
 A Professional Corporation
 Attorneys at Law
 500 Pioneer Tower
 888 S.W. Fifth Avenue
 Portland, OR 97204-2089
 (503) 499-4573 • Fax (503) 285-0915

NOI-9506\5JPHO.COM

1 and Babbitt by September 10, 1995 to award, release, and permit
2 to be completed in fiscal years 1995 and 1996, with no change in
3 originally advertised terms, volumes, and bid prices, all timber
4 sale contracts offered or awarded prior to July 27, 1995 in any
5 national forest in Oregon and Washington or BLM district in
6 western Oregon, including contracts offered or awarded in FY
7 1991-95, except for sale units in which a threatened or endan-
8 gered bird species is known to be nesting; and

9 2. NFRC's motion for a permanent injunction is granted.
10 Defendants Glickman and Babbitt, and their officers, agents,
11 servants, employees, and attorneys, and those persons in active
12 concert or participation with them, are hereby compelled and
13 directed to immediately award, release, and permit to be complet-
14 ed in fiscal years 1995 and 1996, with no change in originally
15 advertised terms, volumes, and bid prices, all timber sale
16 contracts offered or awarded prior to July 27, 1995 in any
17 national forest in Oregon and Washington or BLM district in
18 western Oregon, including contracts offered or awarded in FY
19 1991-95, except for sale units in which a threatened or endan-
20 gered bird species is known to be nesting.

21 In support of this motion the Court is respectfully referred
22 to the Memorandum in Support of Motion for Order of Contempt to
23
24
25
26

Page

2 - NFRC'S MOTION FOR CONTEMPT
OR IN THE ALTERNATIVE TO
ENFORCE SEPTEMBER 13 ORDER

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 499-4573 • Fax (503) 295-0915

N01-9506\5JPMO.CON

1 Enforce September 13, 1995 Order or In Alternative To Clarify
2 Order, and the Declaration of Christopher I. West and exhibits
3 attached thereto filed herewith.

4 Dated this 21st day of September, 1995.

5 MARK C. RUTZICK LAW FIRM
6 A Professional Corporation

7
8 By: 

9 Mark C. Rutzick
10 Alison Kean Campbell
11 Attorneys for Plaintiff
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Page 3 - NFRC'S MOTION FOR CONTEMPT
OR IN THE ALTERNATIVE TO
ENFORCE SEPTEMBER 13 ORDER

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 499-4572 • Fax (503) 295-0915

N01-9506\JBCONT.001

1 Mark C. Rutzick, OSB # 84336
2 Alison Kean Campbell, OSB #93011
3 MARK C. RUTZICK LAW FIRM
4 A Professional Corporation
5 500 Pioneer Tower
6 888 S.W. Fifth Ave.
7 Portland, Oregon 97204-2089
8 (503) 499-4573

9 Attorneys for Plaintiff

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF OREGON

12 NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
13 COUNCIL, an Oregon corporation,	)	Lead Case
)	
14 Plaintiff,	)	Civil No. 95-6267-HO
	)	Consolidated Cases
15 vs.)	
)	
16 DAN GLICKMAN, in his capacity)	
17 as Secretary of Agriculture;)	
18 BRUCE BABBITT, in his capacity)	
19 as Secretary of the Interior,)	
)	
20 Defendants.)	

21 PLAINTIFF NFRC'S MEMORANDUM
22 IN SUPPORT OF MOTION
23 FOR ORDER OF CONTEMPT TO ENFORCE
24 SEPTEMBER 13, 1995 ORDER
25 OR IN ALTERNATIVE TO CLARIFY ORDER
26

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 499-4573 • Fax (503) 295-0915

N01-9506\1JBCONT.001

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF FACTS	1
1. September 13, 1995 Order	1
2. The government's refusal to comply with the Order and its refusal to award and release the sales that are the subject of the Order	2
ARGUMENT	3
I. A CONTEMPT ORDER IS APPROPRIATE TO ENFORCE THE SEPTMBER 13, 1995 ORDER	3
A. The government is in contempt of the court's Order because it has failed and refused to immediately award and release the FY 1991-1995 timber sales	4
B. The government's responsible officials should be sanctioned both monetarily and by incarceration until it complies with the court's Order and releases the FY 1991-1995 sales	7
II. IN THE ALTERNATIVE NFRC MOVES THE COURT TO CLARIFY ITS ORDER AND STATE IN SPECIFIC AND UNDENIABLE TERMS THAT THE DEFENDANTS MUST IMMEDIATELY AWARD AND RELEASE THE FY 1991-1995 TIMBER SALES	11
CONCLUSION	13

Page

i - NFRC'S MEMORANDUM IN SUPPORT OF MOTION FOR
ORDER OF CONTEMPT OR IN ALTERNATIVE TO
CLARIFY ORDER

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 498-4572 • Fax (503) 295-0815

N01-9506\JJBCONT.001

TABLE OF AUTHORITIES

Page

Cases

<i>Armstrong v. Executive Office of President,</i> 821 F. Supp. 761 (D.D.C. 1993), rev'd 1 F.3d 1274 (D.C. Cir. 1993)	5, 8, 9
<i>General Signal Corp. v. Donallco, Inc.,</i> 787 F.2d 1376 (9th Cir. 1986)	4
<i>Shillitani v. United States,</i> 384 U.S. 364 (1966)	4
<i>Spallone v. United States,</i> 493 U.S. 265 (1990)	11
<i>Stone v. City and County of San Francisco,</i> 968 F.2d 850 (9th Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993)	4, 7
<i>U.S. v. Laurins,</i> 857 F.2d 529 (9th Cir. 1988)	10, 11
<i>Whittaker Corp. v. Execuair Corp.,</i> 953 F.2d 510 (9th Cir. 1992)	8
<i>Young v. U.S. ex rel Vuitton et Fils S.A.,</i> 481 U.S. 787 (1987)	4

Statutes

<i>Rescissions Act of 1995,</i> Pub. L. 104-19, 109 Stat. 246 (July 27, 1995)	2, 5-10, 12
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Regulations

Fed. R. Civ. P. 65(d)	1, 3, 10
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Miscellaneous

Black's Law Dictionary	5
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NO1-9506\1JBCONT.001

INTRODUCTION

On September 13, 1995 this court issued an Order ("Order") granting plaintiff Northwest Forest Resource Council's ("NFRC's") motion for summary judgment as to its first and second claims, which sought an order of mandamus and an injunction compelling the government to comply with its statutory duty to award and release all FY 1991-1995 timber sales by September 10, 1995 except for sale units in which a threatened or endangered species is known to be nesting.

The government has failed and refused to award and release these timber sales in response to the court's Order. The government has instead taken the position that the court's Order is not an injunction satisfying Rule 65(d) and that therefore award and release of sales is not required.

The government's refusal to comply with this court's Order evidences the government's disregard for the law as set forth by this court and by Congress. An order finding defendants in contempt, followed by sanctions, is appropriate in these circumstances.

STATEMENT OF FACTS**1. September 13, 1995 Order.**

On September 13, 1995 this court filed an Order on plaintiff's and defendants' cross-motions for summary judgment on plaintiff's first and second claims for relief ("Order"). The Order described the issue being decided as "an action for declaratory and injunctive relief to compel defendants to award

Page

1 - NFRC'S MEMORANDUM IN SUPPORT OF MOTION FOR
ORDER OF CONTEMPT OR IN ALTERNATIVE TO
CLARIFY ORDER

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 490-4573 • Fax (503) 295-0915

1 and release all timber sales offered prior to the date of the
2 enactment of the Emergency Salvage Timber Sale Program in all
3 national forests in Oregon and Washington and all national
4 forests in Oregon and Washington and all Bureau of Land Manage-
5 ment ("BLM") districts in Western Oregon, in which no endangered
6 bird species is known to be nesting." Order at 1 (emphasis
7 added).

8 The Order states that "[t]he record indicates that
9 plaintiff's proposed interpretation of section 2001(k)(1) is
10 precisely what Congress intended." Order at 10. The Order then
11 states that "Plaintiff's motion for summary judgment as to its
12 first and second claims for relief (#31) is allowed. Defendant's
13 cross motion for summary judgment (#24) is denied." Order at 11.

14 **2. The government's refusal to comply with the Order and**
15 **its refusal to award and release the sales that are the**
subject of the Order.

16 Despite the court's Order the government has maintained its
17 refusal to award and release the timber sales that are the
18 subject of the Order. On September 14, 1995 a spokesman for Tom
19 Tuchmann, the government officer in charge of timber sales in
20 this region, announced to the press that the government would not
21 award or release timber sales in response to the court's Order.
22 Mr. Tuchmann's spokesman stated that the court's Order does not
23 direct "any particular action." See September 15, 1995 Oregonian
24 article, attached to the Declaration of Christopher West as
25 Exhibit A.

26 On September 15, 1995 the government filed a "Motion for

Page

2 - NERC'S MEMORANDUM IN SUPPORT OF MOTION FOR
ORDER OF CONTEMPT OR IN ALTERNATIVE TO
CLARIFY ORDER

MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 489-4573 • Fax (503) 295-0915

NOI-9506\1JBCONT.001

1 Reconsideration of Consolidation Order and Motion to Transfer" in
2 this case. In that pleading the government stated its position
3 that the Order "does not constitute an injunction that satisfies
4 the requisites of Rule 65(d) Fed. R. Civ. Proc. and cannot be
5 considered a final judgment." Motion at 3.

6 After NFRC notified the government that it would move for an
7 order of contempt unless the timber sales subject to the Order
8 were immediately awarded and released, the government submitted
9 an additional document setting forth its position. On September
10 20, 1995 the government filed a "Notice of Filing" attaching
11 declarations from a Forest Service official, Gray F. Reynolds,
12 and a BLM official, Nancy K. Hayes. Mr. Reynolds states that
13 "[i]t is the Forest Service's understanding that the Order is not
14 an injunction," but that the Forest Service has been "taking
15 steps to ensure compliance with the Court's Order, including
16 participating in meetings, conducting further review and collect-
17 ing information. . . ." Reynolds Dec., ¶¶ 5, 6. Ms. Hayes
18 states that "[i]n accordance with the Court's ruling, I have
19 asked the BLM Oregon State Director to further review the timber
20 sale contracts within the geographic region as interpreted by the
21 Court, and to gather information necessary to proceeding with
22 these sales" Hayes Dec., ¶ 3.

23 ARGUMENT

24 I. A CONTEMPT ORDER IS APPROPRIATE TO ENFORCE THE 25 SEPTEMBER 13, 1995 ORDER.

26 "There can be no question that courts have inherent power to

Page

3 - NFRC'S MEMORANDUM IN SUPPORT OF MOTION FOR
ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 489-4572 • Fax (503) 295-0915

N01-9506\1JBCONT.001

1 enforce compliance with their lawful orders through civil
2 contempt." *Shillitani v. United States*, 384 U.S. 364, 370
3 (1966). "Civil contempt occurs when a party fails to comply with
4 a court order." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d
5 1376, 1379 (9th Cir. 1986). "The ability to punish disobedience
6 to judicial orders is regarded as essential to ensuring that the
7 Judiciary has a means to vindicate its own authority without
8 complete dependence on other branches." *Young v. U.S. ex rel*
9 *Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987).

10 To establish contempt the moving party must show by clear
11 and convincing evidence "that the contemnors violated a specific
12 and definite order of the court. The burden then shifts to the
13 contemnors to demonstrate why they were unable to comply." *Stone*
14 *v. City and County of San Francisco*, 968 F.2d 850, 856 n.9 (9th
15 Cir. 1992), cert. denied, 113 S. Ct. 1050 (1993). The contemnors
16 must show that they have performed "all reasonable steps within
17 their power to insure compliance with the court's orders." *Id.*
18 at 856 (citation omitted). The district court has "wide latitude
19 in determining whether there has been a contemptuous defense of
20 its order." *Id.*

21 A. *The government is in contempt of the court's Order because*
22 *it has failed and refused to immediately award and release*
the FY 1991-1995 timber sales.

23 There is no question that this court's Order ordered the
24 defendants to immediately award and release the FY 1991-1995
25 timber sales that were the subject of the motion. The
26 government's interpretation of the Order as not requiring action

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1 from it is implausible, and made for the purpose of delay and
2 obstruction. The government's deliberate refusal to take action
3 in response to this court's ruling requires that it be held in
4 civil contempt of the court's Order.

5 The government cannot in good faith claim that the court did
6 not order it to immediately award and release the timber sales
7 that were the subject of the summary judgment motion. The Order
8 specifically granted NFRC's motion for summary judgment on its
9 first and second claims for relief. Order at 11. NFRC's first
10 and second claims sought declaratory and injunctive relief
11 "directing defendants to comply with their mandatory duty to
12 award and release the FY 1991-95 sales by September 10, 1995,"
13 (Claim One), and to compel defendants to take the action required
14 by the terms of § 2001(k) which they had unlawfully withheld,
15 i.e., "the award and release of the FY 1991-95 sales" (Claim
16 Two).

17 Moreover, the court specifically entitled its order an
18 "Order," not merely an opinion or decision. Black's Law Dictio-
19 nary defines an "order" as "a mandate; precept; command or
20 direction authoritatively given." The Order also clearly
21 described the issue being decided as "an action for declaratory
22 and injunctive relief to compel defendants to award and release
23 all timber sales" Order at 1 (emphasis added).

24 Nor can the government claim in good faith that the Order is
25 unclear as to when the government is required to take action.
26 Compare *Armstrong v. Executive Office of President*, 821 F. Supp.

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 489-4573 • Fax (503) 295-0915

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1 761 (D.D.C. 1993), rev'd 1 F.3d 1274, 1289 (D.C. Cir. 1993).
2 Section 2001(k)(1) requires that the timber sales subject to the
3 statute be awarded and released by September 10, 1995, 45 days
4 after the Act's date of enactment. The Order was entered on
5 September 13, 1995, three days after the deadline set forth in
6 the statute for government action. The Order therefore requires
7 the government to act immediately to award and release the timber
8 sales that were the subject of the summary judgment motion, as no
9 time remained under the statute for government inaction.

10 The government's current refusal to take action in response
11 to the court's Order is disingenuous. The disputed issue which
12 was the subject of the summary judgment motion at issue here
13 centered on the scope of § 2001(k)(1), with the government
14 claiming that the new law applied only to the so-called "section
15 318 sales," and NFRC arguing that the law applied to all Forest
16 Service units and BLM districts within the geographic area of
17 section 318, including the "section 318 sales" and also the FY
18 1991-1995 sales.

19 At no time did the government claim not to understand that
20 the law required the immediate release of the sales that were
21 subject to the law; the only dispute raised was regarding which
22 sales the law governed. Indeed, at the summary judgment hearing
23 the government submitted an exhibit in the record regarding the
24 timber sales that had been awarded and released pursuant to
25 § 2001(k)(1).

26 Accordingly, the court's Order finding that "plaintiff's

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 499-4673 • Fax (503) 296-0915

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1 proposed interpretation of section 2001(1)(k) is precisely what
2 Congress intended," Order at 10, resolved the only issue in
3 dispute regarding 2001(k)(1). The government was therefore
4 required to follow the plain language of the statute, and
5 immediately award and release the FY 1991-1995 timber sales that
6 were the subject of the summary judgment motion and the Order.

7 *B. The government's responsible officials should be sanctioned*
8 *both monetarily and by incarceration until it complies with*
9 *the court's Order and releases the FY 1991-1995 sales.*

10 NFRC has satisfied its burden of showing by clear and
11 convincing evidence that the government has violated this court's
12 Order. *Stone v. City and County of San Francisco*, 968 F.2d at
13 856 n.9. Indeed, the government admits that it has not awarded
14 or released any of the 234 million board feet of timber sales
15 that were the subject of the Order, and instead claims that the
16 Order does not require that it award and release these sales.
17 See Govt's Motion for Reconsideration of Consolidation Order,
18 at 3.

19 The "meetings" and "collecting of information" that the
20 government claims to be doing in response to the Order in the
21 Reynolds and Hayes declarations are not defenses to this motion
22 for an order of contempt. To avoid a finding of contempt the
23 government bears the burden of proving that it has "performed all
24 reasonable steps within [its] power to insure compliance with the
25 court's orders." *Stone v. City and County of San Francisco*, 968
26 F.2d at 856. The bureaucratic inaction described in the govern-
ment's declarations does not meet this standard. Moreover, these

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 488-4873 • Fax (503) 296 0916

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1 "meetings" and "collecting of information" are steps the govern-
2 ment should have been taking when the Rescissions Bill was
3 passed, and indeed are steps the government assured this court it
4 was taking, in arguing against NFRC's early motion for a tempo-
5 rary restraining order requiring the government to take steps so
6 that it could comply with the statute by September 10, 1995 if
7 the court ultimately adopted NFRC's interpretation of
8 § 2001(k)(1). The government's belated decision to start taking
9 these steps is not a defense to this motion for an order of
10 contempt, and also contradicts the government's assertion that
11 the September 13 Order does not require it to take any action.

12 Once a court finds a party to be in civil contempt, "the
13 penalty imposed may consist of either a monetary fine or impris-
14 onment." *Armstrong v. Executive Office of the President*, 821 F.
15 Supp. at 772. Civil contempt sanctions "are employed for two
16 purposes: to coerce the defendant into compliance with the
17 court's order, and to compensate the complainant for losses
18 sustained." *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517
19 (9th Cir. 1992).

20 The court has the power to impose coercive sanctions on
21 federal agency officers. *Armstrong v. Executive Office of the*
22 *President*, 821 F. Supp. at 773. Fines imposed upon a government
23 agency in a civil contempt proceeding are deposited into the
24 court registry. *Id.* "[S]uch coercive sanctions are necessary to
25 ensure that the executive branch of government does not treat
26 with impunity the valid orders of the judicial branch." *Id.*

N01-9506\1JBCONT.001

(citation omitted).

Coercive sanctions against the government and its officials are appropriate here. The government's refusal to award and release timber sales in compliance with the court's Order amounts to a refusal to award and release all FY 1991-1995 timber sales, including at least the 234 million board feet of timber previously identified by the defendants. NFRC requests that monetary sanctions in the amount of \$50,000 per day for the first week of noncompliance, with the fines doubling every week thereafter that the sales are not awarded and released. See *Armstrong v. Executive Office of the President*, 821 F. Supp. at 773 (imposing similar sanctions against the government for its failure to comply with orders requiring it to promulgate new regulations for the preservation of electronic federal records). Compensatory damages, in an amount to be proven at a hearing on this motion, should also be awarded.

As a further sanction against the government's refusal to comply with the Order, NFRC also requests imprisonment of the federal officials in charge of the administration's timber sale program until the sales at issue are awarded and released. NFRC recognizes that imprisonment is an extreme sanction. However, the government's unyielding refusal to comply with the clear requirements set forth by Congress in § 2001(k)(1), and its adamant refusal to comply with this court's Order requiring award and release of the timber sales pursuant to § 2001(k)(1), is an extreme example of the executive branch of government refusing to

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 498-4573 • Fax (503) 295-0916

N01-9506\1JBCONT.001

1 comply with the valid and serious requirements imposed by the
2 other two branches of government.

3 Out of respect for the Cabinet level responsibilities of
4 defendants Glickman and Babbitt, NFRC does not request the
5 imprisonment of the two Secretaries. Rather NFRC seeks impris-
6 onment of James Lyons and Tom Tuchmann. Mr. Lyons is the Under
7 Secretary of Agriculture, Natural Resources and Environment
8 Section, and oversees the Forest Service. Mr. Lyons is also the
9 author of the administration's August 22, 1995 interpretation of
10 § 2001(k)(1), which document still apparently governs the
11 administration's interpretation of the statute, despite this
12 court's Order. Mr. Tuchmann is the director of the Office of
13 Forestry and Economic Development in Portland, Oregon, and is the
14 administration's official in charge of implementing the federal
15 timber sale program in this region. See Declaration of Christo-
16 pher West, December 15, 1993 Oregonian article attached to West
17 Dec. as Exhibit B. Mr. Tuchmann's office issued the administra-
18 tion's first public statement refusing to take action to release
19 the sales in response to the court's Order. Id. and Exhibit A
20 attached thereto.

21 Contempt sanctions against these two government officials is
22 clearly contemplated under the law. "A court order binds parties
23 and those in active concert with parties who have actual knowl-
24 edge of the order." *U.S. v. Laurins*, 857 F.2d 529, 535 (9th Cir.
25 1988); Fed. R. Civ. P. 65(d). Further, "[a] nonparty may be held
26 liable for contempt if he or she either abets or is legally

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 488-4573 • Fax (503) 295 0915

N01-9506\1JBCONT.001

1 identified with the named defendant." *Id.* Both Mr. Lyons and
2 Mr. Tuchmann are legally identified with defendants Glickman and
3 Babbitt. Imposing contempt sanctions against these two offi-
4 cials, rather than against the Cabinet level defendants, is also
5 consistent with the doctrine that a court must exercise "the
6 least possible power adequate to the end proposed." *Spallone v.*
7 *United States*, 493 U.S. 265, 272 (1990). (overturning district
8 court's imposition of contempt sanctions against council members
9 where such sanctions did not satisfy this standard).

10 Because these two officials are in charge of the
11 government's policy regarding timber sales, and Mr. Tuchmann
12 issued statements to the press regarding the government's refusal
13 to award and release timber sales in response to the court's
14 Order, they are the proper government officials to hold in civil
15 contempt of the court's Order. They should be ordered imprisoned
16 until the FY 1991-1995 timber sales are awarded and released.

17 **II. IN THE ALTERNATIVE NFRC MOVES THE COURT TO CLARIFY**
18 **ITS ORDER AND STATE IN SPECIFIC AND UNDENIABLE**
19 **TERMS THAT THE DEFENDANTS MUST IMMEDIATELY AWARD**
20 **AND RELEASE THE FY 1991-1995 TIMBER SALES.**

21 NFRC believes that the court's Order is clear and complete,
22 and that it orders defendants to immediately award and release
23 the FY 1991-1995 timber sales which were the subject of the
24 summary judgment hearing and plaintiff's first and second claims
25 for relief.

26 However, in the event that the court countenances
defendant's claims of ignorance as to what the court's Order

N01-9506\JJBCONT.001

1 ordered it to do, NFRC asks that the court amend its order to
2 additionally state the following:

3 "IT IS HEREBY ORDERED THAT:

4 1. NFRC's motion for a declaratory judgment is granted.
5 Section 2001(k) (1) of Pub. L. 104-19 requires defendants Glickman
6 and Babbitt by September 10, 1995 to award, release, and permit
7 to be completed in fiscal years 1995 and 1996, with no change in
8 originally advertised terms, volumes, and bid prices, all timber
9 sale contracts offered or awarded prior to July 27, 1995 in any
10 national forest in Oregon and Washington or BLM district in
11 western Oregon, including contracts offered or awarded in fiscal
12 years 1991-95, except for sale units in which a threatened or
13 endangered bird species is known to be nesting; and

14 2. NFRC's motion for a permanent injunction is granted.
15 Defendants Glickman and Babbitt, and their officers, agents,
16 servants, employees, and attorneys, and those persons in active
17 concert or participation with them, are hereby compelled and
18 directed to immediately award, release, and permit to be complet-
19 ed in fiscal years 1995 and 1996, with no change in originally
20 advertised terms, volumes, and bid prices, all timber sale
21 contracts offered or awarded prior to July 27, 1995 in any
22 national forest in Oregon and Washington or BLM district in
23 western Oregon, including contracts offered or awarded in fiscal
24 years 1991-95, except for sale units in which a threatened or
25 endangered bird species is known to be nesting.

26

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2039
(503) 489-4673 • Fax (503) 295-0910

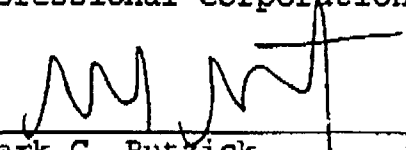
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CONCLUSION

NFRC's motion for an order of contempt, or in the alternative for an order clarifying the September 13, 1995 Order, should be granted.

Dated this 21st day of September, 1995.

MARK C. RUTZICK LAW FIRM
A Professional Corporation

By: 
Mark C. Rutzick
Alison Kean Campbell
Attorneys for Plaintiff

Page

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ORDER OF CONTEMPT OR IN ALTERNATIVE TO
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MARK C. RUTZICK LAW FIRM
A Professional Corporation
Attorneys at Law
500 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204-2089
(503) 488-4573 • Fax (503) 295-0915

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1 Mark C. Rutzick, OSB # 84336
 2 Alison Kean Campbell, OSB #93011
 3 MARK C. RUTZICK LAW FIRM
 4 A Professional Corporation
 5 500 Pioneer Tower
 6 888 S.W. Fifth Ave.
 7 Portland, Oregon 97204-2089
 8 (503) 499-4573

9 Attorneys for Plaintiff

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF OREGON

12 NORTHWEST FOREST RESOURCE	)	Civil No. 95-6244-HO
13 COUNCIL, an Oregon corporation,	)	Lead Case
)	
14 Plaintiff,	)	Civil No. 95-6267-HO
	)	Consolidated Cases
15 vs.)	
	)	DECLARATION OF CHRISTOPHER
16 DAN GLICKMAN, in his capacity	)	I. WEST
as Secretary of Agriculture;)	
17 BRUCE BABBITT, in his capacity)	
as Secretary of the Interior,)	
)	
18 Defendants.)	

19 Christopher I. West, with full knowledge of the penalty of
 20 perjury, declares as follows:

21 1. My name is Christopher I. West. I am the Vice Presi-
 22 dent of the Northwest Forestry Association ("NFA"), a trade
 23 association of 80 lumber and plywood manufacturing companies in
 24 Washington and Oregon. NFA is located in Portland, Oregon. NFA
 25 is a member of the Northwest Forest Resource Council ("NFRRC"),
 26 the plaintiff in this case. I make this declaration on personal

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1 knowledge, and if called to testify as a witness herein would
2 testify as set forth below.

3 2. Mr. Tom Tuchmann has represented to NFRC that he is the
4 director of the United States Interagency Office of Forestry and
5 Economic Development in Portland, Oregon. He has on numerous
6 occasions further represented that he is the administration's
7 official in charge of implementing the federal timber sale
8 program and policies in this region. Mr. Tuchmann's spokesman is
9 Clarence Moriwaki. A statement made by him to the Portland
10 Oregonian on September 14, 1995 is attached hereto as Exhibit A.

11 3. Attached hereto as Exhibit B is a December 15, 1993
12 article from the Portland Oregonian, describing Mr. Tuchmann's
13 appointment. The article states that Mr. Tuchmann "will serve as
14 director of the Interagency Office of Forestry and Economic
15 Development." The article also states that Mr. Tuchmann "will be
16 in charge" of the Clinton Administration's Northwest forest
17 management program, and will have "direct access" to cabinet
18 officials."

19
20 I declare under penalty of perjury that the foregoing is
21 true and correct.

22
23 Executed on September 21, 1995.

24
25 
26 Christopher I. West

Acrimony over logging grows

■ The timber industry and environmentalists prepare for more court battles over the Warner Creek salvage operation

By DANA TIMS

Correspondent, The Oregonian

One day after winning access to millions of acres of green, old-growth trees, the timber industry prepared Thursday to go back to court to have the Clinton administration held in contempt of court.

The anticipated action dampened a clear-cut industry victory secured Wednesday when a federal judge in Eugene ordered the government to proceed with stalled timber sales throughout Oregon and Washington.

"The administration couldn't read the simple language in the law, and now they can't read the simple language in the judge's order," said Chris West, spokesman for the Northwest Forestry Association. "I guess that leaves us no alternative

but to file a motion asking the judge to hold them in contempt of court."

Government attorneys said they can't appeal Judge Michael R. Hogan's ruling because it does not include language ordering the U.S. Forest Service to take any particular action. They may ask the judge to clarify his intent when he returns from a European vacation in two weeks.

The administration is following congressional intent included in a "salvage rider" attached to an appropriations bill calling for the release of timber sales held up for environmental and other reasons, said Clarence Moriwaki, a spokesman for President Clinton. He defended the holding back of about 100 million board feet of timber located within areas inhabited by the marbled murrelet, a small seabird listed as endangered.

"The salvage bill itself says that no unit shall be released if any threatened or endangered bird species is known to be nesting in the unit," he

Please turn to
TIMBER, Page C5

Timber: Protesters go into mountains

■ Continued from Page C1
said.

In another development Thursday, a spokeswoman for the 9th Circuit Court of Appeals in San Francisco said the court is expected to decide by Friday whether to grant an emergency injunction halting logging at Warner Creek near Oakridge.

Scores of anti-logging protesters have swarmed into the rugged mountains near the site, where an initial timber sale of 520,000 board feet already has been awarded to Thomas Creek Lumber Co. of Lyons. The issue caught fire last week when Hogan ruled that the salvage rider applies to Warner Creek, where an arson-caused fire scorched nearly 9 million acres in 1991.

If the appeals court grants an emergency injunction, salvage logging at Warner Creek could be held up until next spring, said Marianne Dugan, an attorney representing the Sierra Club and the Oregon Natural Resources Council.

Thomas Creek has until early December before heavy snows are likely to delay any logging work until spring, said Rex Storm, a forest analyst with the Associated Oregon Loggers. The longer the wait, he said, the more the downed and blackened trees will deteriorate.

Protesters maintained their vigil Thursday on a road leading into the site. A U.S. Forest Service crew showed up in the morning to shoot some video footage of the area but left soon afterward.

Congregating at the gate is not a crime, said Mike Morris, environmental coordinator for the Willamette National Forest. But he warned that individuals will be cited for criminal offenses if they are identified as having dug the trenches that have appeared across the road in recent days.

EXHIBIT A
PAGE 1

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3M

METRO/NO

Portland office to be established for NW forest management plan

DEC 15 1993

The Oregonian

The Interagency Office of Forestry and Economic Development is created to help put the Clinton plan into effect

By ROBERTA ULRICH
of The Oregonian staff

The Clinton administration announced Tuesday it will oversee its Northwest forest management plan from a new office in Portland.



TUCHMANN

Tuesday's announcement from the Interior and agriculture departments drew praise for establishment of the office in the Northwest and some skepticism about what it would accomplish.

Tuchmann, 33, will serve as director of the Interagency Office of Forestry and Economic Development, which is being created to put the Clinton forest plan into effect. His job will include both changing management of federal forests and getting about \$270 million a year in federal financial assistance to communities and forest workers af-

CLINTON'S



ected by declining levels of logging.

With solid backing from the White House in a memo from Deputy Chief of Staff Roy Neel, Tuchmann appears to have the direct access to Cabinet officials that will allow

him to cut red tape.

Tuchmann, who was en route from Washington, D.C., to Portland Tuesday, said he hopes to have the new office open by late next month. Neither its location nor staff has been selected. Tuchmann said the staff will be small, but its number has not been set.

"The idea is not to create bureaucracy," he said. "It is to help agencies work out coordination."

The plan won't be completed until next spring. In May 1991, U.S. District Judge William Dwyer in Seattle halted most federal timber sales in Western Oregon, Western Washington and Northern California until the Forest Service completed a plan that would protect the spotted owl, a threatened species.

Dwyer extended the deadline for the final plan for three months — until March 31 — after the government received 63,000 comments from the public on its preliminary plan.

The plan covers about 20.7 million acres of forest lands managed by the U.S. Forest Service of the Depart-

TOM TUCHMANN

■ AGE: 33

■ POSITION: director, Office of Fore and Economic Development

■ OCCUPATION: Policy and research analyst, congressional aide

■ SALARY: \$93,000

■ EDUCATION: M.S., natural resource policy, Penn State, 1986; B.S., forest management, Northern Arizona U., 1983

■ EXPERIENCE: Clinton administration transition team, 1992 to present; Senate Agriculture Committee staffer, 1989 to present; resource policy director, Society of American Foresters, 1987-89; policy analyst, 1988.

ment of Agriculture and the Bureau of Land Management of the Department of Interior.

Rep. Peter DeFazio, D-Ore., said any central point of focus to make sense of the forest plan "has got to be good news for the region." He praised Tuchmann as a person "with good understanding and good base of knowledge" about the issue. "I think he'll be good," DeFazio said.

Jackie Lang, coordinator for the Oregon Lands Coalition, found it encouraging that the office will be based in the state, but she said Tuchmann faces an impossible task "until the administration comes to grips with the immense social and economic price" of its plan.

She said, "It seems they put on layer on layer of bureaucracy, but the implementing is not getting done."

Larry Tuttle of the Oregon Natural Resources Council said he believes Tuchmann understands that the forest solution must be based on sound scientific principles. He called Tuchmann knowledgeable and accessible.

Tuchmann expects the new office to exist for only two years to make the transition to forest management based on entire ecosystems with much less clearcutting than traditional practices.

He will work with the several federal agencies involved in forest management and economic assistance and with state, county, local and tribal governments and private organizations.

"I will spend more time taking information to Washington from the region than I will taking information from Washington to the region," he said. He added that he is moving West to help local managers make the plan work and "help them find the resources they need."

Tuchmann holds degrees in forest management and forest resources. He is a former director of resource policy for the Society of American Foresters and, before joining the Clinton administration, was a professional staff member of the Senate Agriculture Committee, where he dealt with the Northwest forest controversy. Most recently he has been special assistant for forest issues to Interior Secretary Bruce Babbitt.

Tuchmann will testify Wednesday in Portland at a hearing by Rep. Ron Wyden, D-Ore., on job development in timber dependent areas.

EXHIBIT

B

PAGE

1



Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, SEPTEMBER 13, 1995

ENR
(202) 514-2008
TDD (202) 514-1888

COURT RULES UNITED STATES MUST RELEASE NORTHWEST TIMBER SALES

WASHINGTON -- A U.S. District Court in Oregon ruled today that the federal government must release timber sales in the Pacific Northwest that had been suspended for environmental protection. The decision came in the case of Northwest Forest Resources Council v. Dan Glickman and Bruce Babbitt.

A timber industry group sued the government shortly after the President signed the 1995 Rescissions Act on July 27 that included a "timber salvage" rider. Under the timber salvage rider, Congress included language which, having nothing to do with salvage, required the sale of healthy ancient forest timber as previously mandated by a 1990 appropriations bill. The Administration had argued that the language in the rescissions bill dealt only with sales in 1990. The timber industry countered that the language meant all timber sales offered before July 27, 1995.

In a statement issued this afternoon, Lois J. Schiffer, Assistant Attorney General in charge of the Department's Environment and Natural Resources Division, said:

"We are extremely disappointed by today's decision. If allowed to stand, the decision could jeopardize the careful balance that the President has struck between moving timber, improving commerce and protecting the environment. At the very time we have begun to see the benefits of this balance, the timber industry, its allies in Congress and now this ruling threaten to take us back to gridlock."

###

Name	Date
Steven Reich	6/2/99

Counsel
(entire
file)

Name	Date
Steven Reich	6/2/99

Counsel

PHOTOCOPY
PRESERVATION